RSAC 2025 Conference

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Forensic Investigative and Legal Challenges with New Cyber Regulations

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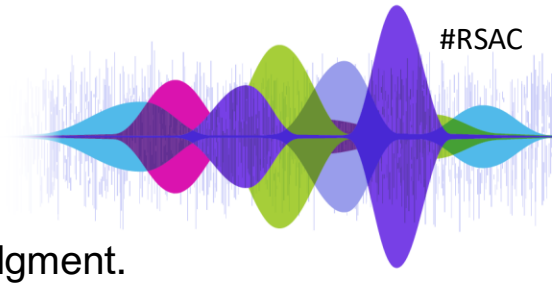

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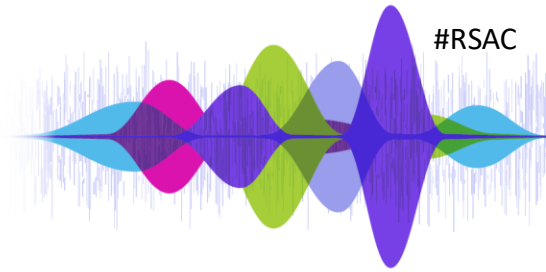
Cyber Incident Reporting Requirements



Securities and Exchange Commission	Department of Defense (DFARS 7012)	Cybersecurity and Infrastructure Security Agency (proposed)
➢ Public companies must disclose "material cybersecurity incidents" within 4 business days of discovery.	➢ Contractors must "rapidly report" a "cyber incident" within 72 hours of discovery.	➢ Critical infrastructure entities must report cyber incidents within 72 hours for "covered cyber incidents"; must report ransom payments within 24 hours.

LEGAL PRIVILEGES

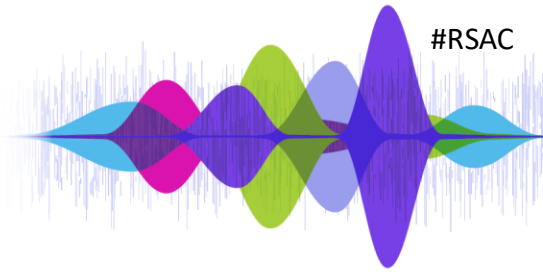
Attorney Client Communications

- Applies to communications.
- Between a lawyer and client.
- For the purpose of seeking legal advice.
- Privilege can be waived by intentional disclosure to a third party.

Attorney Work Product

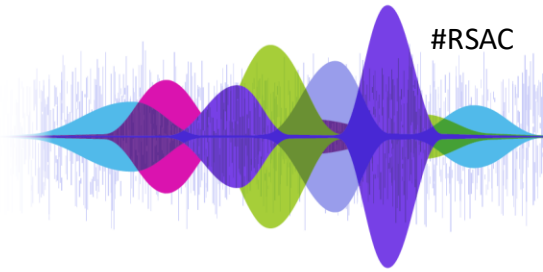
- Applies to documents and tangible things.
- Prepared in anticipation of litigation or trial.
- Prepared by or for a party or their representative.

Privileged communications and work product may not be subject to disclosure in litigation.



In Re Rutter's Data Security Breach Litigation

- Company retained outside counsel the same day it received security alerts for advice on "potential notification obligations."
- Outside counsel retained forensic firm the next day "to determine whether unauthorized activity … resulted in the compromise of sensitive data…."
- Litigation was not contemplated when forensic report prepared.
- Report/related communications were not protected by privilege:
  - Report was prepared in the "ordinary course" and discussed facts;
  - Primary purpose of the report was not to assist in providing legal advice.



In Re Target Corp. Customer Data Security Breach Litigation

- Two-track investigative approach:
  - "Ordinary course" investigation for non-privileged review;
  - Data Breach Task Force under privilege for legal advice.
- Target demonstrated that the Data Breach Task Force was not focused on remediation but on informing in-house and outside counsel so they could provide legal advice and prepare for litigation.
- Target also produced documents/tangible things, including forensic images, that allowed plaintiffs to learn how the data breach occurred from a separate report not engaged by counsel.

APPLY – LESSONS LEARNED

CHALLENGES

- Tight reporting deadlines.
- Divergent views of materiality.
- Stakeholder tensions.
- Potential for data breach litigation.
- Difficulties with protecting privilege.

BEST PRACTICES

- Adopt a proactive and multi-layered approach to minimize risk.
- Preparation and collaboration are key.
- Establish a relationship with the FBI before a critical incident.
- Consider implications of a dual track forensic investigation under privilege.
- Engage outside counsel, forensic firms, crisis communications under privilege.
- Understand reporting obligations and timelines in advance.

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